Supreme Court, U.S.
FILED
MAR 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1444

VINCENT DeCARLO,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

VINCENT DeCARLO,

Petitioner,

vs.

THE STATE OF NEW JERSEY

Respondent.

Petition for Writ of Certiorari to the Supreme Court of New Jersey

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The Petitioner, Vincent DeCarlo respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey denying petitioner's Petition for Certification entered in this proceeding on December 19th, 1978.

OPINION BELOW

The opinions of the Law Division and the Appellate Division of the State of New Jersey appears in the Appendix hereto. No opinion was rendered by the Supreme Court of New Jersey.

JURISDICTION

The judgment of the Supreme Court was entered on December 19th, 1978. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether a Public Employee is deprived of due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution when he is denied a hearing prior to a determination that his conviction for conspiracy to violate the Public Bidding Laws was a crime of Moral Turpitude.

STATEMENT OF THE CASE

On February 8th, 1974, Vincent DeCarlo, a contractor was found guilty of conspiracy to violate the public bidding statute of New Jersey with reference to work he performed in the City of Union City. Vincent DeCarlo was a policeman for the Town of North Bergen. The Commissioner of Public Safety held a hearing on January 5th and January 11th, 1977 and determined that the offense was not one of moral turpitude and Vincent DeCarlo was reinstated as a member of the North Bergen Police Department.

Some eight months later on August 2nd, 1977, plantiff-respondent, the Prosecutor of Hudson County instituted a civil suit in the Superior Court seeking the removal of Vincent DeCarlo from his employment as a police officer by the Township of North Bergen. An

answer was filed by Vincent DeCarlo on August 30th, 1977. The court listed the case for a pre-trial and in fact a pre-trial was held September 27th, 1977. Defendant-petitioner objected to the procedure being followed by the court in that the court was barring defendant-petitioner from presenting factual proof. Defendant-petitioner, Vincent DeCarlo filed exceptions to the pretrial order since the court was scheduling the case for argument without permitting the parties to present any factual evidence.

On December 8th, 1977, the trial judge after listening to the arguments of counsel advised the parties that he had tentatively decided the issues in favor of plaintiff-respondent but he directed that plaintiff-respondent amend his complaint to add the Board of Commissioners and the Township of North Bergen as parties. The court signed an order directing the filing of an amended complaint. An amended complaint was filed. The Commissioners and Township of North Bergen filed an answer in which they alleged that the Administrative decision that had been previously made by the Commissioner of Public Safety in which he found that the offense for which Vincent DeCarlo had been convicted did not involve moral turpitude was supported by the facts. As soon as the answer was filed, the court listed the case for pretrial. At the pretrial, which was held on January 18th, 1978, the attorney for the Township of North Bergen advised the court that he would adopt the arguments and brief that had been filed on behalf of Vincent DeCarlo. After the attorney for North Bergen made these representations, the court stated that it would render its decision removing Vincent DeCarlo as a police officer. On September 21st, 1978, the Appellate Division affirmed the order removing Vincent DeCarlo as a police officer.

For eighteen years, Vincent DeCarlo had been a police officer in the Township of North Bergen. In addition, Vincent DeCarlo was self employed as a private contractor. In 1971 and 1972 he did some contracting work for the City of Union City. He had never performed any contracting work for a municipality or government agency before this time. This contracting work was separate and apart from his police work.

As a consequence of doing this work and the fact that no bids had been submitted for the work, Vincent DeCarlo was convicted of the offense of having committed a conspiracy to violate the public bidding laws. Prior to the submission of the criminal case to the jury, the judge struck from the indictment, all allegations that Vincent DeCarlo had cheated and defrauded the City of Union City.

Subsequent to the conviction, the Commissioner of Public Safety held a disciplinary hearing to determine if Vincent DeCarlo should be removed from office as a consequence of the conviction. After investigating the facts, the commissioner determined that the offense for which Vincent DeCarlo had been convicted was not one of moral turpitude. The commissioner reinstated Vincent DeCarlo as a police officer.

In the present case, the Superior Court Judge, however, without holding a hearing concerning the facts of the case and without examining the record of the trial determined that the offense for which Vincent DeCarlo had been convicted involved moral turpitude and that Vincent DeCarlo should immediately be removed from office.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of the United States Supreme Court as to the proper interpretation of the Fourth and Fifth Amendments to the United States Constitution.

The essence of due process of law is the right to adequate notice and a fair hearing. *Opp. Cotton Mills v. Administrator*, 312 U.S. 126 (1941). At a hearing a party has a right to present evidence. *Morgan v. United States*, 304 U.S. 1, 18 (1938).

It is clear that in this case, Vincent DeCarlo had a recognized right to continued employment. He was a tenured civil service employee. In the present case the state not only removed Vincent DeCarlo from his employment but did so in a manner that subjected him to moral condemnation. The state removed him on the grounds that his conduct constituted moral turpitude. In *Board of Regents v. Roth*, 408 U.S. 564 at 573 (1972):

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantincau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L.Ed.2d 515, 519.* * * In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's interest in his "good name, reputation, honor, or integrity" is at stake.

A further effect of the removal of DeCarlo is that the Chief Examiner and Secretary of Civil Service can automatically disqualify him from further state service. *N.J.A.C.* 4:1-8.14(a). Such a concrete injury is a protectable liberty interest. *Board of Regents v. Roth, supra; Paul v. Davis,* 424 U.S. 693 (1976); *Bishop v. Wood,* 426 U.S. 341 (1976).

It has been held that the statutes in New Jersey which provide for forfeiture of office upon conviction of an offense involving moral turpitude are not self-executing. *Newark v. Dept. of Civil Service,* 68 N.J. Super. 416, 432 (App. Div. 1961); *Clark v. Ennis,* 45 N.J.L. 69, 72 (Sup. Ct. 1883); *Galloway v. Council of Clark Township,* 92 N.J. Super. 409, 418 (Law Div. 1966).

It is a *sine qua non* that prior to removal there must be a determination that under the particular facts and the application of the relevant legal rules the employee committed an offense of moral turpitude. *Newark v. Department of Civil Service,* 68 N.J. Super. at 422-425, *supra.* In *Galloway v. Council of Clark Township, supra,* the Court followed *Newark v. Dept. of Civil Service, supra,* holding at p. 418:

> "Finally the accused has the right to a hearing before the appropriate agency to determine if the crime or offense for which he was convicted • • • involved moral turpitude." *Galloway,* 409 N.J. Super. at 418.

Due process of law entitled Vincent DeCarlo to a hearing in which he was entitled to be heard. *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972); *Baldwin v. Hale,* 68 U.S. (1 Wall) 223, 233 (1864). In *Green v. McElroy,* 360 U.S. 474, 496 (1959), the Supreme Court stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's cases must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Those cases which determined that a factual hearing must be held when the state seeks removal of office because the offense involved moral turpitude did not arise in a vacuum. The necessity for a hearing developed because of the difficulty in defining the extent and scope of moral turpitude.

"Moral turpitude" has been defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Black's Law Dictionary* (4th Ed.), p. 1160.

In attempting to define moral turpitude in a specific case, conflicting rules have arisen. The issue of exactly what crimes involve or do not involve moral turpitude has been the subject of extensive annotations. *Annotation,* "Infamous Crime or one involving Moral Turpitude—disqualification—office," 52 A.L.R. 2d 1314 (1959); *See also Annotation,* 95 L.Ed. 899 (1951); *Annotation,* "Immigration and Nationality Act—crime involving Moral Turpitude," 23 A.L.R. Fed. 480 (1975). Many of the crimes cited therein include and involve violence, *i.e.*, murder, assault and those of baseness (robbery, larceny, burglary involving some form of theft or fraudulent practice), fraud, embezzlement, extortion and tax evasion. On the other hand, disorderly conduct offenses and carrying a concealed weapon are generally held not to involve moral turpitude. *Annotation,* supra. 52 A.L.R. 2d 1314. The

United States Supreme Court discussed "moral turpitude" in *Jordan v. DeGeorge*, 341 U.S. 223, 227 (1951) in connection with a conspiracy to violate the Internal Revenue Code. Noting that the term "moral turpitude" has deep roots in the law, it did not find the term too vague and followed state and federal court decisions in holding that a crime in which fraud is an ingredient involved moral turpitude.

In *State of N.J. Div. of Alcohol Bev. Cont. v. McNally*, 91 N.J. Super. 513 (App. Div. 1966), where the defendant was convicted for bookmaking, the court held that insofar as liquor licenses were concerned, an examination of the underlying facts to determine whether there existed moral turpitude should be made, unless the crime is of such a nature that moral turpitude or its absence must be conclusively presumed. The court, emphasizing the need for such a factual examination further stated: [o]n the other hand, we cannot agree with ABC's contention that all bookmaking necessarily involved moral turpitude." *Id.* at 518.

In *State Bd. of Med. Examiners v. Weiner*, 68 N.J. Super. 464, 487-488 (App. Div. 1961) the defendant-physician was accused of manslaughter. The court discussed the rationales for the rules prevailing in other jurisdictions as to whether the underlying facts should be considered and, while specifically refraining from deciding that it was improper for an administrative agency to look to the fact, said "we cannot altogether accept appellant's motion that manslaughter . . . can under no circumstances involve moral turpitude," and "in a wide range of crimes, including manslaughter, the fact of moral turpitude may not necessarily be ascertainable from either the indictment or the record of conviction, but may have to be sought in the details of the manner in which the particular defendant perpetrated the offense."

And, as was stated in *Galloway v. Council of Clark Tp., supra:*

> "The concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times. * * * This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community. * * * There is no hard and fast rule as to what constitutes moral turpitude. It cannot be measured by the nature or character of the offense unless, or course, it be an offense inherently criminal, the very commission of which implies a base and depraved nature. The circumstances attendant upon the commission of the offense usually furnish the best guide." (at p. 887). 92 N.J. Super at 419-420.

It is important to note that if Vincent DeCarlo had been convicted of an offense involving the administration of his office, then there would be no necessity for a factual hearing to make a determination if the offense involved moral turpitude. This was not an issue in the present case, since this offense was separate and apart from the administration of Vincent DeCarlo's office as a policeman in North Bergen. All the cases which speak of automatic forfeiture of employment upon conviction without a need for a judgment of forfeiture involved only crimes clearly touching the administration of offices or positions. *Walter v. Police & Fire, Etc., Trenton*, 120 N.J.L. 39, 41 (Sup. Ct. 1938) (police officer convicted for malfeasance in office); *Mulsoff v. Sloat*, 8 N.J. Misc. 554, 555 (Sup. Ct. 1930) (police officer convicted of assault and battery in making arrest); *Hayes v. Hudson County Bd. of Freeholders*, 116 N.J. Super. 21, 26 (App. Div. 1971) (County freeholder convicted of being personally interested in sale of goods

to the county). All involved the cases where one automatically forfeited his office under *N.J.S.* 2A:135-9 on conviction of a crime touching the administration of office.

Not one of the cases cited by the trial court addressed itself to the question of whether the conspiracy to commit the offense was a greater evil than the substantive offense itself. It is doubtful if even the court in *Dennis v. United States*, 341 U.S. 494, 573 (1950) cited by the trial court and decided at the height of the McCarthy era would have followed the reasoning of the trial court to its logical conclusion that a conspiracy to overthrow the government was a greater evil than the overthrowing of the government itself.

What cannot be overlooked is that in the criminal case in which Vincent DeCarlo was convicted; the trial court determined that there was no proof that the City of Union City had been defrauded. The trial court not only granted a judgment of acquittal on the substantive charge, but also struck from the indictment all allegations that the defendant conspired to cheat and defraud the City of Union City. In other words, all elements of fraud had been removed from the case. The jury in effect was told that Vincent DeCarlo could be convicted of a conspiracy to violate the bidding laws even if he had no intent to defraud the city. With the conviction being in his posture, it becomes imperative for someone to examine the record to determine if moral turpiture was involved in this particular offense. In determining this issue among other facts, it might be relevant to know that Vincent DeCarlo had never before performed contracting work for a municipality. It was also undisputed at the criminal trial that all the work he performed exhibited good workmanship. Vincent DeCarlo made no profit from the work that he did. Vincent DeCarlo never paid anything to anyone in order to obtain this work.

If the trial court had been an administrative hearing examiner due process of law would have entitled Vincent DeCarlo to present facts in support of his position. *Morgan v. United States, supra; Green v. McElroy; supra; Merry Heart Nurses and Conv. Home v. Dougherty,* 131 N.J. Super. 412, 419 (App. Div. 1974). Due process applies no less to a court of law and Vincent DeCarlo should have been given an opportunity to present facts in support of his position that the particular acts for which he had been convicted did not constitute a crime of moral turpitude.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

MILLER, HOCHMAN,
MEYERSON & SCHAEFFER
Attorneys for Vincent DeCarlo

By: /s/ Gerald D. Miller
GERALD D. MILLER

GERALD D. MILLER
Of Counsel

SUPPLEMENTAL APPENDIX

OPINION

Decided:

Mr. Russell V. D'Italia, Assistant Prosecutor, for plaintiff (Mr. James T. O'Halloran, Prosecutor of Hudson County, attorney).

Mr. Gerald D. Miller for defendant Vincent DeCarlo (Messrs. Miller, Hochman, Meyerson and Schaeffer, attorneys).

Mr. Ralph R. Feigelson for defendants Peter M. Mocco, Ralph Affuso, Alphonse Pinto, William V. Duffy, as Constituting the Board of Commissioners of the Township of North Bergen in the County of Hudson.

BILDER, J.S.C.

This is an action In Lieu of Prerogative Writ brought by the Hudson County Prosecutor to remove a North Bergen Police Officer from office pursuant to *N.J.S.A.* 2A:135-9 —a statute mandating forfeiture of office upon conviction of certain offenses. By order of this court, the governing body of North Bergen was added as a party defendant.

On February 8, 1974 Vincent DeCarlo was convicted of conspiring to violate public bidding laws. Although his office was declared forfeit on December 29, 1976, he was reinstated on January 14, 1977 following a determination by the Commissioner of Public Safety of North Bergen that the crime of which plaintiff was convicted is not one of moral turpitude.

N.J.S.A. 2A:135-9 provides as follows:

"Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere to, an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry or plea.

"If the conviction of such officer be reversed, he shall be restored to his office or position with all the rights and emoluments thereof from the date of the forfeiture."

I.

It is not disputed that the office held by defendant is within the statute, that he was convicted of the First Count of Indictment No. 65 of the 1971 term and that the Indictment charges him with the commission of a misdemeanor which does *not* touch on the administration of his office. At issue is the question as to whether the offense of which he was charged and found guilty is one involving moral turpitude.

Our courts have not heretofore passed on the precise question as to whether a conspiracy to violate the bidding laws is a crime involving moral turpitude. They have however determined the meaning of "moral turpitude" in the context of other crimes.[1] Thus guidance in resolving this otherwise unique case is available.

1. The following crimes have been found to involve moral turpitude: larceny, *Raphalides v. N.J. Dept. of Civil Service*, 80 *N.J. Super.* 407 (App. Div. 1963); willful evasion of taxes, *Berardi v. Rutter*, 42 *N.J. Super.* 39 (App. Div. 1956) *aff'd* 23 *N.J.* 485, *DeMoura v. Newark*, 90 *N.J.* Super. 225 (App. Div. 1966); extortion and income tax evasion, *Mount v. Trustees of Pub. Emp. Retirement Syst.*, 133 *N.J. Super.* 72 (App. Div. 1975); fixing of parking tickets, *Fromm v. Bd. of Directors of Police, etc., Retire. System*, 81 *N.J. Super.* 138 (App. Div. 1963); possession of goods stolen from interstate shipment, *Weinstein v. Div. of Alcoh. Bev. Control*, 70 *N.J. Super.* 164 (App. Div. 1961); concealing and withholding stolen property, *Severini v. State, etc., Div. of Alcoh. Bev. Control*, 82 *N.J. Super.* 1 (App. Div. 1964); conspiracy to obtain money for a zoning variance, *Galloway v. Council of Clark Tp.*, 92 *N.J. Super.* 409 (Law Div. 1966) *aff'd* 94 *N.J. Super.* 527 (App. Div. 1967).

It is well settled law that where the intent to defraud is an essential element of a crime, that crime is one of moral turpitude. *Jordem v. DeGeorge*, 341 U.S. 223, 227 (1950); *Berardi v. Rutter*, 42 N.J. Super. 39, 48 (App. Div. 1956) *aff'd* 23 N.J. 485 (1957).

The First Count of Indictment No. 65 of the 1971 term generally charges that defendant conspired "to pervert the due administration of the laws of the State of New Jersey pertaining to the requirements for public advertisement for bids and public bidding in public contracts" and "to violate the criminal laws of the State of New Jersey pertaining to the misconduct in office of public officials."

It is not necessary to determine the existence of moral turpitude from the substantive offense, the conspiracy itself denotes moral turpitude—*i.e.*, the fact of the conspiracy—the agreement to violate the bidding laws—connotes moral turpitude. This "partnership in criminal purposes"[2] to violate the public bidding laws is in itself a fraud upon the State. The public's right to the benefits of public advertising and bidding were defeated, other contractors were cheated of their right to equal bidding opportunity, and the public was cheated of its right to have public officials conduct its affairs with propriety and in accordance with law. See *Fromm v. Bd. of Directors of Police, etc., Retire.*

2. *U.S. v. Kessel*, 218 *U.S.* 601, 608 (1910).

System, 81 N.J. Super. 138, 143 (App. Div. 1963).[3] "The basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish." *Dennis v. U.S.*, 341 U.S. 494, 573 (1950).

Thus, the offense for which defendant was found guilty is one involving moral turpitude within the meaning of *N.J.S.A.* 2A:135-9 and requires forfeiture of office.

II.

It is the contention of the defendant that even if his conviction required forfeiting by virtue of *N.J.S.A.* 2A:135-9, the relief herein sought is barred by a number of procedural barriers: the requirement for an administrative hearing, exhaustion of remedies, lack of timeliness under *R.* 4:69-6, lack of standing, absence of necessary parties, laches, *res adjudicata* and collateral estoppel.

To put these contentions in context, it must be noted that we are dealing here with the right to be a police officer of a man who entered into an agreement with public officials to act with them in violation of the laws of this State. He thereby was not only guilty in participating in the violation of those laws but in aiding to bring about their misconduct in office.

By enactment of *N.J.S.A.* 2A:135-9, the Legislature has enunciated a strong public policy against the holding of

3. In affirming a finding that alterations of public records was moral turpitude for the purposes of the police pension laws, the court said:

> "We need not pass on the question of whether an intent to defraud is requisite to a violation of *N.J.S.* 2A:136-1 [the statute proscribing alterations of public records]. Suffice for the purpose that under the facts of this case the *result of altering* and downgrading traffic tickets *was to defraud the State*. Even-handed justice for all traffic violators was defeated and the enforcement of our motor vehicle laws undermined." (Emphasis supplied.) *Fromm, supra*, 145.

public office upon certain criminal conviction. The importance of this public policy is underscored by the fact the forfeiture is immediate and automatic. It is not abated or stayed pending appeal. The job is forfeit upon conviction. In the event of a reversal, the office is restored with back pay. See discussion *Hayes v. Hudson County Bd. of Freeholders*, 116 N.J. Super. 21, 25-26 (App. Div. 1971). See also *Newark v. Department of Civil Service*, 68 N.J. Super. 416, 423 (App. Div. 1961).

This public policy becomes peculiarly relevant when applied to a police officer. As the guardian of our laws, he more than anyone must uphold and respect those laws. "A police officer occupies a unique position in our society. * * * [H]e stands in the public eye as an upholder of that which is morally and legally correct." *Fromm, supra*, 143.

The right which is being vindicated in this action is a public right. The Prosecutor seeks to enforce an important State policy.

In this setting it is clear that the procedural barriers erected by defendant must fail. They cannot act as a shield to permit his continuance as a police officer in contravention of *N.J.S.A.* 2A:135-9.

With respect to the administrative procedural barriers, defendant misconceives the nature of this proceeding. As already noted, *N.J.S.A.* 2A:135-9 mandates automatic forfeiture. The procedural setting is significantly different from that in which the removal is discretionary or the statute provides for a Civil Service hearing. *Cf. Newark v. Department of Civil Service*, 68 N.J. Super. 416 (App. Div. 1961). Nor is this a review of an administrative action. When defendant was found guilty, his office as police of-

ficer ceased. Since that date he has held that position illegally.[4]

With respect to *res adjudicata* and collateral estoppel, the plaintiff was not a party to that earlier departmental hearing and in any event the determination of the Police Commissioner is at best a determination of law by an administrative official and as such is not entitled to the application of these doctrines. See *U.S. v. Utah Construction Co.*, 384 U.S. 394, 421-422 (1966); *Russel v. Tenafly Bd. of Adjustment*, 31 N.J. 58, 65 (1959).[5]

With respect to laches, it need only be noted that, apart from the fact that there is no prejudice in the delay, this equitable principle cannot act as a shield to removal from an office which is being held contrary to law.

With respect to the plaintiff's standing to bring suit suffice it to say that in the absence of appropriate action of others[6] the Prosecutor, as the chief law enforcement officer of the County (*N.J.S.A.* 2A:158-5) has an obligation to see that the laws of the State are followed and that the illegal holding of this office is terminated.

Judgment is granted to the plaintiff. The office held by defendant DeCarlo as a North Bergen Police Officer is

4. It should be noted that even if this were a proceeding to review an administrative action, these procedural defenses would not defeat the public's right to have *N.J.S.A.* 2A:135-9 enforced. Exhaustion of remedies is not required in a case such as this where the question is solely one of law. *Nolan v. Fitzpatrick*, 9 *N.J.* 477 (1952); *Durgin v. Brown*, 37 *N.J.* 202 (1962). Nor is it required where the public interest demands a speedy solution. *Waldor v. Unterman*, 10 *N.J. Super.* 188 (App. Div. 1950); *Durgin v. Brown, supra.* Similarly the time limits of *R.* 4:69-6 yield to important public rights. See *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 588 (1975); Pressler, *Current N.J. Court Rules*, Comment to *R.* 4:69-6 at 803.

5. Of course if this were a proceeding to review an administrative action, *res adjudicata* and collateral estoppel would be inapplicable.

6. While not material to this decision, it is interesting to note that this matter was brought to the Prosecutor's attention by the Attorney General with the suggestion that an action for removal from office be instituted.

declared forfeit. Defendant DeCarlo shall immediately cease to hold such office and North Bergen shall forthwith carry out all administrative acts necessary and proper to the effectuation of this ruling. An order shall be submitted but the forfeiture and the order that defendant DeCarlo cease holding office as North Bergen Policeman shall be effective immediately.

OPINION

Argued: September 12, 1978—Decided: September 21, 1978.

Before Judges Lynch, Crane and Horn.

On appeal from Superior Court, Law Division, Hudson County.

Mr. Leonard Meyerson argued the cause for appellant Vincent DeCarlo (Messrs. Mliler, Hochman, Meyerson & Schaeffer, attorneys; Mr. Gerald D. Miller on the brief).

Mr. Ralph R. Feigelson, attorney for appellant Township of North Bergen, submitted the matter on appellant DeCarlo's brief.

Mr. Lowell Espey, Deputy Attorney General, argued the cause for respondent (Mr. John J. Degnan, Attorney General, attorney; Mr. William F. Hyland, Former Attorney General).

PER CURIAM

The judgment is affirmed substantially for the reasons stated in the opinion of Judge Lawrence Bilder, reported at 156 N.J. Super. 249 (Law Div. 1978). We comment briefly on certain points.

Defendant urges that his conviction did not denote moral turpitude because the trial judge at the criminal proceeding struck out charges in the fourth count of the indictment that defendant and Paul J. Lombardo, municipal Director of Public Safety and one of the alleged conspirators, defrauded Taffaro Lumber Company. The fourth count charged defendant and Lombardo with obtaining "material and other things of value * * *" from Taffaro Lumber Co. and Union City with intent to cheat and defraud them.

But the fact remains that defendant on the first count of the indictment was found to have "willfully and knowingly" conspired "to pervert the due administration of the laws of the State of New Jersey pertaining to the requirements for public advertisement for bids and public bidding in public contracts" and "to violate the criminal laws of the State of New Jersey pertaining to the misconduct in office of public officials." Had the jury not found the necessary intent to have existed, it would not have found defendant guilty. Accordingly we concur in the trial judge's conclusion that the offense charged was one which involved moral turpitude.

We also agree with the trial judge that in a case such as this, where the conviction of a crime of moral turpitude is clearly present, defendant cannot go behind the "conviction" mentioned in the statute, *N.J.S.A.* 2A:135-9, in order to circumvent the statutory mandate of forfeiture of his office.

AFFIRMED.

A TRUE COPY

Elizabeth McLaughlin
Clerk

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 19th day of December, 1978.

A TRUE COPY

Stephen Wamand
Clerk

Supreme Court, U. S.
FILED
MAY 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1444

VINCENT DE CARLO,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1444

VINCENT DE CARLO,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Respondent, the State of New Jersey, respectfully prays that the Writ of Certiorari sought by Petitioner to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on September 21, 1978, be denied.

Opinions Below

The following proceedings of the state courts are reproduced in the Petitioner's appendix: the order of the Supreme Court of New Jersey denying certification, not yet reported; the opinion of the Superior Court of New Jersey, Appellate Division, reported at 162 N.J. Super. 174, 392 A.2d 615 (App. Div. 1978); and the opinion of the Superior Court of New Jersey, Law Division, reported at 156 N.J. Super. 249, 383 A.2d 769 (Law Div. 1978).

Statutes Involved

N.J.S.A. 2A:135-9

> Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere to, an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdismeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry of plea.
>
> If the conviction of such officer be reversed, he shall be restored to his office or position with all the rights and emoluments thereof from the date of the forfeiture.

N.J.S.A. 2A:98-1 (a), (e), (f) and (h)

> Any 2 or more persons who conspire:
>
> a. To commit a crime; or
>
> • • •

> e. To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or
>
> f. To obtain money by false pretenses; or
>
> • • •
>
> h. To commit any act for the perversion or obstruction of justice or the due administration of the laws—
>
> Are guilty of a conspiracy and each shall be punished, in the case of a conspiracy to commit a crime involving the possession, sale or use of narcotic drugs, as for a high misdemeanor and in all other cases, as for a misdemeanor.

N.J.S.A. 40A:11-1

> This act shall be known and may be cited as the "Local Public Contracts Law."

N.J.S.A. 40A:11-4

> Every contract or agreement, for the performance of any work or the furnishing or hiring of any materials or supplies, the cost or the contract price whereof is to be paid with or out of public funds, not included within the terms of section 3 of this act, shall be made or awarded only by the governing body of the contracting unit after public advertising for bids and bidding therefor, except as is provided otherwise in this act or specifically by any other law. No work, materials or supplies shall be undertaken, acquired or furnished for a sum exceeding in the aggregate $2,500.00, except by contract or agreement.

Counter Statement of Question Presented

1. Whether a public employee was denied due process when he was removed from office upon a legal determination that his conspiracy conviction involved moral turpitude.

Counter Statement of the Case

Pursuant to U.S.Sup.Ct. Rule 40-3, 28 U.S.C.A., Respondent respectfully submits the following additions and corrections to Petitioner's Statement of the Case.

Hudson County Indictment No. 65-72 charged Vincent De Carlo and two codefendants, Paul J. Lombardo and James E. Lagomarsino, with a series of offenses stemming from construction work performed by De Carlo Contracting Co., Inc. for the City of Union City, New Jersey. Lombardo and Lagomarsino were the Director of Public Safety and the Director of Revenue and Finance, respectively, of Union City. De Carlo was a police officer in North Bergen, New Jersey.

Count I of the indictment charged all three defendants with conspiracy to "pervert the due administration of the laws of the State of New Jersey pertaining to the requirements for public advertisement for bids, and public bidding on public contracts, [citations omitted], to violate the criminal laws of the State of New Jersey pertaining to the misconduct in office by public officials [citation omitted], and to cheat and defraud the City of Union City of money and property by false pretense and cheat . . .," contrary to N.J.S.A. 2A:98-1(a), (e), (f) and (h).

Count I listed 19 overt acts supporting the conspiracy. The first nine overt acts specified that Lombardo had authorized De Carlo, without public bidding, to perform

repair work in the office of the Detective Bureau Commander; that the repairs were duly completed; that De Carlo submitted two payment vouchers in the amounts of $2475 and $2435; that Lombardo certified both of these vouchers as to their necessity and propriety; and that De Carlo was thereafter paid. The next six overt acts specified that without prior bidding Lombardo had authorized De Carlo to perform repairs on the Public Works Building, "well knowing that said repairs would and did cost in excess of $2,500.00."* Thereafter, it was alleged, De Carlo supervised the project, submitting vouchers to the city for work in excess of $7000, which Lombardo certified. Lombardo also allegedly certified "the claims of divers subcontractors and suppliers for services and materials" used in the Public Works Building, and totalling over $11,000. For his part, Lagomarsino was charged with certifying to the propriety of an additional $5500 of claims, by falsely alleging that they had been furnished to his department, rather than to Lombardo's. In overt act 17, Lagomarsino was charged with approving for payment claims vouchers worth $24,000. In overt acts 18 and 19, De Carlo was charged with ordering, receiving, and appropriating for his own use $9000 worth of lumber, while directing the supplier to submit the bill to Lombardo.

Count II charged Lombardo with misconduct in office for authorizing De Carlo to perform repairs costing in excess of $2500 in the Detective Bureau Commander's office, without adhering to the public bidding laws, contrary to N.J.S.A. 2A:85-1.

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* The figure $2500 is significant, since a municipality may not contract for work or supplies in excess of $2500 unless there has been prior public advertisement for bids. N.J.S.A. 40:50-1 (prior to July 1, 1971); N.J.S.A. 40A:11-4 (effective July 1, 1971).

Count III charged Lombardo and Lagomarsino with misconduct in office for authorizing De Carlo and various subcontractors to furnish services and materials in excess of $2500 for the repair of the Public Works Building, without adhering to the public bidding laws, in violation of N.J.S.A. 2A:85-1.

Count IV charged De Carlo and Lombardo with obtaining property by making false representations to Taffaro Lumber Co. and Union City, with intent to cheat and defraud the company and the city, contrary to N.J.S.A. 2A:111-1.

Trial of all three defendants was held before the Honorable James H. Dowden, J.C.C., and a jury, on January 16 to February 8, 1974. Following the presentation of the State's case, the court dismissed Count IV and struck the language from Count I which charged the defendants with "cheating and defrauding the City of Union City." Following the defense case, the court acquitted Lagomarsino of all charges.

The jury deliberated and found De Carlo and Lombardo guilty of conspiracy, and Lombardo guilty of both counts of misconduct in office.

Both Lombardo and De Carlo made motions for new trials which were heard before Judge Dowden on March 15 and 25, 1974. Their motions were granted. Thereafter, the Superior Court, Appellate Division, granted the State's motion for leave to take an interlocutory appeal, reversed the order granting a new trial, reinstated the jury's verdicts, and remanded for sentencing. *State* v. *Vincent De Carlo and Paul J. Lombardo,* No. A-2548-73 (App. Div., Feb. 23, 1976). On May 18, 1976, the New Jersey Supreme Court denied defendants' motion for leave to appeal.

On December 21, 1976, Judge Dowden sentenced De Carlo to a suspended one year term in Hudson County Jail, and imposed one year of probation and a fine of $1,000. This conviction was affirmed by the Appellate Division. *State* v. *Lombardo, Lagomarsino and De Carlo,* No. A-1838-76 (App. Div., Jan. 17, 1978).

Petitioner was advised on December 29, 1976 by the North Bergen Director of Public Safety that his position as a police officer was deemed to have been forfeited by virtue of his conviction of a crime involving moral turpitude. At Petitioner's request, an administrative hearing was held on January 5 and 11, 1977. The Director thereafter reversed himself and, on January 14, 1977, issued a written opinion reinstating defendant as a North Bergen police officer (A.1).

The present action was commenced by the Hudson County Prosecutor on August 2, 1977. After hearing argument from the parties, the court issued a written opinion and entered judgment declaring De Carlo's office forfeit, on the theory that his conviction for conspiracy evinced moral turpitude. This judgment was affirmed by the Appellate Division and thereafter the New Jersey Supreme Court denied certification. *O'Halloran* v. *De Carlo,* 156 N.J. Super. 249, 383 A.2d 769 (Law Div.), aff'd *per curiam* 162 N.J. Super. 174, 392 A.2d 615 (App. Div.), certif. den. —— N.J. ——, —— A.2d —— (1978).

The present Petition for Writ of Certiorari was docketed with this Court on March 19, 1979.

REASONS FOR DENYING CERTIORARI

POINT I

Due process does not require a factual hearing when the question to be resolved is purely one of law.

Petitioner De Carlo argues that he was entitled to a factual hearing in the state courts of New Jersey to determine whether the crime of which he was convicted evinces moral turpitude. As a matter of New Jersey law, a public employee forfeits his office upon conviction of a crime of moral turpitude. N.J.S.A. 2A:135-9. The State submits that in appropriate cases the determination of whether a particular offense comes within the ambit of the forfeiture statute is a question of law, requiring no factual hearing.

It is well-settled that certain offenses *per se* evince moral turpitude, permitting various collateral consequences to attach based solely on the record of the judgment of conviction. For example, "[w]ithout exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude." *Jordan* v. *DeGeorge,* 341 U.S. 223, 227 (1951). When a conviction plainly evinces moral turpitude, a court will not look behind the record of conviction to ascertain whether there may be mitigating factors. See, *e.g., Jordan* v. *DeGeorge, supra* (conspiracy to defraud on payment of federal tax); *United States ex rel. Volpe* v. *Smith,* 289 U.S. 422 (1933) (counterfeiting); *Winestock* v. *Immigration and Naturalization Service,* 576 F.2d 234 (9 Cir. 1978) (dealing with counterfeit obligations); *Lozano-Giron* v. *Immigration and Naturalization Service,* 506 F.2d 1073, 1076 (7 Cir. 1974) (possession of counterfeit obligations); *Marciano* v. *Immigration and Naturalization Service,* 450 F.2d 1022 (8 Cir. 1971), *cert.* den. 405 U.S. 997 (1972) (statutory rape); *Morgano* v. *Pilliod,*

299 F.2d 217, 220 (7 Cir. 1962), *cert.* den. 370 U.S. 924 (1962) (conspiracy to defraud).

Thus, in *Soetarto* v. *Immigration and Naturalization Service,* 516 F.2d 778 (7 Cir. 1975), the Court of Appeals for the Seventh Circuit refused to examine the circumstances surrounding an alien's conviction for theft some years previously in the Netherlands. Reasoning that "theft has always been held to involve moral turpitude, regardless of the sentence imposed or the amount stolen," the court refused "to try the foreign crimes *de novo*" and affirmed the final order of the Board of Immigration Appeals deporting the petitioner. 516 F.2d at 780-781.

So too, in *Otash* v. *Bureau of Private Investigators and Adjusters,* 41 Cal.Rptr. 263, 230 Cal.App.2d 568 (Cal.App. 1964), a private investigator argued that the court should consider the level and exact nature of the offense for which he was convicted prior to making a determination of moral turpitude for the purposes of license revocation. The court rejected this contention, ruling that "[w]hether a person has been convicted of a crime involving moral turpitude is a question of law and not of fact." 41 Cal.Rptr. at 266. Under this interpretation, the conviction itself is "the operative fact upon which disciplinary action may be imposed," *id.* at 267, and all that remains is to analyze the elements of the crime to determine whether it embraces conduct which is contrary to justice, honesty and good morals. *Id.* at 266.

Similarly, in *In re Madden,* 184 A.2d 204 (D.C. Mun. 1962), the Municipal Court of Appeals for the District of Columbia was confronted with an appeal from an order denying a renewal of a bondsman's license, predicated on the applicant's conviction for filing fraudulent income tax returns. The applicable statute provided that no person who has ever been convicted of any offense involving

moral turpitude shall be permitted to engage in the business of becoming surety upon bonds in criminal cases. The court analyzed the issue presented as a pure question of law:

> The statute is plain and unambiguous. In order to obtain a license the applicant must be a person who has never been convicted of an offense involving moral turpitude. Conviction of such an offense automatically precludes qualification. The courts have no latitude or discretion in the matter and must follow the plain mandate of the statute. We are therefore presented with only one question: whether the crime for which Madden stands convicted is an "offense involving moral turpitude" within the meaning of the statute just cited. 184 A.2d at 205 (citation omitted).

From these cases it is quite clear that a determination of whether moral turpitude may be inferred from a criminal conviction must be based upon an analysis of the elements of the crime. Equally clear is the proposition that when determinations turn solely on the law, due process does not require a factual hearing. See, *e.g.*, *Dixon* v. *Love*, —— U.S. ——, 97 S.Ct. 1723, 1729 (1977) (concurring opinion); *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970); *Townsend* v. *Sain*, 372 U.S. 293, 312-319 (1963).

The precedents in New Jersey, as elsewhere, indicate that in appropriate cases a conclusion of moral turpitude may be reached as a matter of law based on the fact of conviction. *DeMoura* v. *Newark*, 90 N.J. Super. 225, 227-228, 217 A.2d 19, 21 (App. Div.), certif. den. 46 N.J. 605, 218 A.2d 644 (1966) (filing false income tax return); *Weinstein* v. *Division of Alcoholic Beverage Control*, 70

N.J. Super. 164, 168-169, 175 A.2d 262, 264 (App. Div. 1961) (possession of stolen goods); *cf. Makwinski* v. *State*, 76 N.J. 87, 385 A.2d 1227 (1978) (misconduct in office, which need not involve *mens rea*, held not to constitute moral turpitude; ruling limited to unique facts of case); *Gauli* v. *Board of Trustees*, 143 N.J. Super. 480, 482-83, 363 A.2d 911, 912-913 (App. Div. 1976) (possession of weapon).

In the instant case Petitioner's conviction necessarily involves moral turpitude. Conspiracy is "invested with a potentiality for evil that renders the plans criminal in themselves. . . ." *State* v. *Carbone*, 10 N.J. 329, 91 A.2d 571, 575 (1952). Indeed, a conspiratorial agreement may at times pose an even greater evil than the substantive offense "for the conspiracy may lead to other substantive offenses of a like sort and perhaps to habitual practices." *State* v. *Lavary*, 152 N.J. Super. 413, 377 A.2d 1255, 1260 (Law Div. 1977).

The objects of the conspiracy for which defendant was convicted were the perversion of the administration of the bidding laws and the violation of the criminal laws forbidding misconduct in office by public officials. The public bidding statutes are designed "'to secure competition and to guard against favoritism, improvidence, extravagance and corruption.'" *Trap Rock Industries, Inc.* v. *Kohl*, 59 N.J. 471, 479, 284 A.2d 161, 165 (1971); *Pied Piper Ice Cream, Inc.* v. *Essex County Park Commission*, 132 N.J. Super. 480, 484, 334 A.2d 337, 340 (App. Div. 1975). A conspiracy to circumvent public bidding undermines "the fundamental assumption that the affairs of government should be conducted in an atmosphere free of corrupt influences." *State* v. *Sherwin*, 127 N.J. Super. 370, 379, 317 A.2d 414, 419 (App. Div.), certif. den. 65 N.J. 569, 325 A.2d 703 (1974), *cert* den. 419 U.S. 801 (1975).

Official misconduct, the alternative goal of the conspiracy, amounts to "corrupt misbehavior by an officer in the exercise of the duties of his office or while acting under color of his office." *State* v. *Begyn,* 34 N.J. 35, 49, 167 A.2d 161, 168 (1961). The essence of the crime is wrongful action by a public official "done with 'evil motive or in bad faith and not honestly.'" *State* v. *Schultz,* 71 N.J. 590, 601, 367 A.2d 423, 429 (1976). Such misconduct strikes at the heart of government and is inconsistent with the fiduciary obligation of officials to "transact their business frankly and openly in the light of public scrutiny." *Driscoll* v. *Burlington-Bristol Bridge Co.,* 8 N.J. 433, 475, 86 A.2d 201, 221 (1952), *cert.* den. 344 U.S. 838 (1952).

Defendant's crime thus necessarily resulted in a "fraud upon the State." (A.3) As the Superior Court, Law Division, observed:

> The public's right to the benefits of public advertising and bidding were defeated, other contractors were cheated of their right to equal bidding opportunity and the public was cheated of its right to have public officials conduct its affairs with propriety and in accordance with law. (A.3)

The insidious spread of corrupt officials, whether acting from favoritism or venality, certainly offends the common moral sense prevailing throughout the community. Moreover, the secret award of public contracts not only invites corruption but also drains the public treasury by circumventing competitive bids. Simply stated, "the public was cheated." (A.3).

Accordingly, from the intrinsic fraud and dishonesty evinced by Petitioner's conviction, the courts of New Jersey properly concluded as a matter of law that Petitioner

must forfeit his office by virtue of his moral turpitude. *Jordan* v. *DeGeorge, supra,* 341 U.S. at 227. Petitioner was not entitled to a factual hearing under these circumstances, and this Court should deny his petition for writ of certiorari.

CONCLUSION

For the reasons which are set forth herein, it is respectfully urged that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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